No. 826

In the Supreme Court of the United States

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FEDERAL TRADE COMMISSION, PETITIONER

v.

RALADAM COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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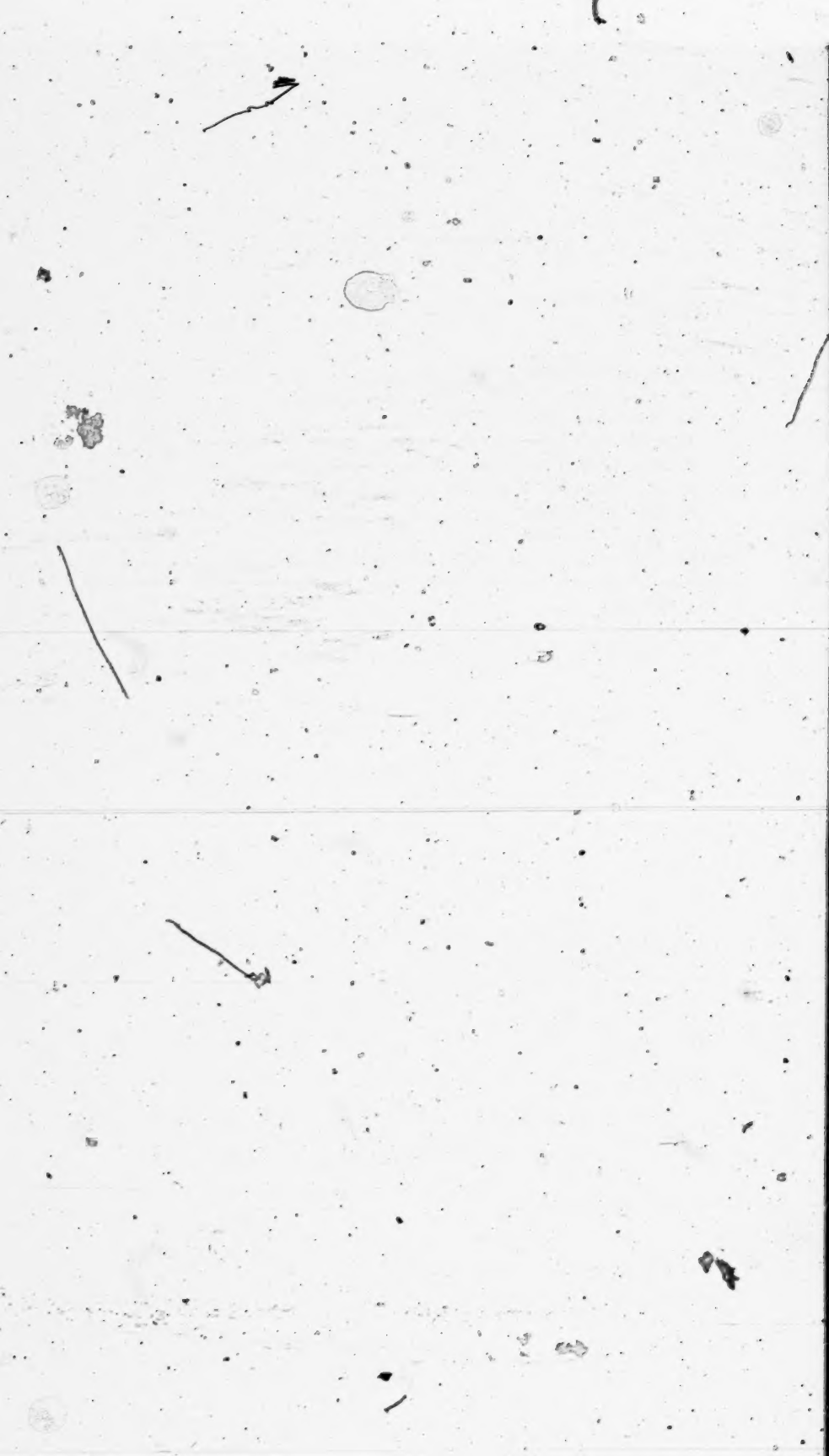

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 781) is reported in 123 F. (2d) 34. The findings of the Commission appear at R. 16–39.

JURISDICTION

The decree of the Circuit Court of Appeals was entered October 7, 1941 (R. 780). The petition for writ of certiorari was filed on December 30, 1941, and was granted on February 9, 1942. The jurisdiction of this Court rests upon Section 5 of the Federal Trade Commission Act, 15 U. S. C., sec. 45, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the evidence supports the Commission's findings that respondent sells its product in competition with numerous other products and that its misrepresentations tend to divert trade from competitors.

(2) Whether Section 5 of the Federal Trade Commission Act requires, in addition to proof and findings that unfair methods have been used in competition in interstate commerce, proof or findings that the unfair methods are injurious to competitors.

(3) Whether any issue in the present proceeding is rendered *res judicata* by the judgment entered in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643.

(4) Whether denial of applications for leave to adduce additional evidence in the first *Raladam* case precludes the bringing of the present proceeding.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, provides in part as follows:[1]

> Unfair methods of competition in commerce are hereby declared unlawful.

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[1] The Commission issued its order in this case prior to passage of the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C., sec. 45, which amended Section 5 by authorizing the Commission also to prevent "unfair or deceptive acts or practices in commerce."

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. * * * If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. * * *

* * * The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional

evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

STATEMENT.

For many years respondent has been engaged in marketing a preparation for reducing weight called "Marmola". In a proceeding under Section 5 of the Federal Trade Commission Act the Commission in 1929 issued an order directing respondent to cease from making, in connection with the sale of Marmola, certain representations which the Commission found to be misleading. This order was held invalid in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, upon the ground that there was in that case no evidence before the Commission to show that any products competitive with respondent's preparation were sold in interstate commerce or that any competitor might be injured as a result of respondent's misrepresentations and that in the absence of such evidence the Commission lacks jurisdiction, in a proceeding under Section 5, to issue an order prohibiting the use of unfair methods of "competition".

Thereafter the Commission instituted the present proceeding in May 1935 by filing a complaint (R. 2), which was subsequently amended in July 1935 (R.

44), charging that respondent had, since April 17, 1929,[2] been promoting the sale of Marmola by means of certain specified false and misleading representations (R. 49–53). The misrepresentations thus charged differ materially from those charged and found in the prior proceeding against respondent (R. 38–39). See p. 31, *infra*. After the taking of evidence on its complaint, the Commission made detailed findings of fact (R. 16–39) and, on the basis of these findings, issued an order directing respondent to cease from making certain specified representations in connection with the sale of Marmola in interstate commerce (R. 40–43).

Among the facts found by the Commission are the following:

Respondent sells its preparation in competition with many other articles and products designed to reduce weight. These competitive products, 26 of which are named, are chiefly patent medicines,[3] pharmaceutical products containing desiccated thyroid, and books of instruction on weight reduction. (R. 17–21.)

Marmola contains certain innocuous ingredients, others having a laxative effect, and desiccated thyroid. The latter is the only one actively affecting

[2] April 17, 1929, is the date on which the Commission's order in the prior proceeding was served on respondent, the order itself having been issued on April 13, 1929 (R. 38).

[3] By "patent medicine" we mean a preparation advertised as a remedy and sold to the general public for use without a doctor's prescription.

weight. The taking of thyroid increases the oxidation of all tissues of the body and when the tissues (including fatty tissues) are burned up more rapidly than they are restored by food, loss of weight results. But the taking of thyroid does not restore an inactive or underactive thyroid gland; it simply supplements the secretions of this gland. (R. 22.)

Most cases of overweight are caused by incorrect eating habits and less than 5% are due to thyroid deficiency. Where the latter is found to be the cause many physicians use desiccated thyroid as a treatment but they do so only if the patient is found to be free from any pathological condition making this treatment harmful or dangerous. Among the conditions which inhibit administration of thyroid are various heart defects, kidney diseases, pregnancy, and abnormal or diseased conditions of organs of the body. Only a trained and experienced person can determine whether obesity is due to thyroid deficiency, whether, in any case, the prospective user's physical condition is such as to make it safe to administer thyroid, the amount of the dose, the effect it produces, and how long it should be continued. (R. 23–24.)

Respondent widely advertises its product (R. 36) and in this advertising makes various false and misleading representations, of which the following are typical: Thyroid deficiency is the usual cause of overweight (R. 24–25); all modern physicians use thyroid in the treatment of obesity; this

medication has the support of world-wide medical opinion; it would probably be prescribed if the purchaser consulted a physician (R. 25–26); taking Marmola is the best way to reduce (R. 27–28); taking it restores the thyroid gland to normal and thus removes the cause of obesity (R. 28–29); all relevant information concerning Marmola and its effect which a prospective purchaser needs to have before deciding upon the use of Marmola is fully and truthfully disclosed in respondent's advertising material (R. 30–36).

The foregoing false and misleading representations induced members of the public to purchase Marmola in preference to the products of competitors and diverted trade from such competitors (R. 36–37).

In making these findings, the Commission had before it the following evidence bearing upon competition:

The trade in Marmola is substantial, averaging between $350,000 and $400,000 a year (R. 107). Respondent does not sell through the mails[4] but sells either to wholesale druggists or to retail drug stores. In either case sales to the consuming public are through the retail drug store (R. 90). Many other patent medicines advertised as effective in reducing weight are sold through the same trade channels as Marmola. One wholesale drug firm

[4] Respondent's predecessor had discontinued mail sales of Marmola after the Post Office Department had objected to this use of the mails (R. 92–94).

handling Marmola handled 11 other patented remedies[5] sold for reducing purposes (R. 257–267, 272). Another wholesale firm dealing in Marmola handled five other patent medicines[6] advertised as remedies for excess weight (R. 239–243, 245–247, 254–255). There was a like situation in the retail field. One chain of retail drug stores (Liggett's) sold Marmola and eight other packaged antiobesity remedies[7] side by side over the counter (R. 474–482). Another such chain sold Marmola and one other like patented remedy (R. 333–335). One concern engaged in selling through the mails two packaged remedies for obesity had been selling one of them (containing thyroid) since 1902 or 1903 and the other (not containing thyroid) for nine or ten years (R. 113–114, 116).

These same wholesale and retail druggists sold various pharmaceutical products containing desiccated thyroid which are advertised only to the medical profession and are ordinarily bought by consumers on a doctor's prescription (R. 252–254, 270–272, 339, 481).

Various books advertised as setting forth systems or methods for reducing weight have been widely

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[5] Nitra Phen Fifties, Arbolene Tablets, Van Nay Tablets, Reducoids, Slendrets, Germania Herb Tea No. 14, Stardom's Hollywood Dietade No. 1, Jad Salts, Eskay's Dextrettes, Dietene, Bon Kora.

[6] Jad Salts, Van Nay Tablets, Dr. McCaskey's RX Tablets, Reducoids, Slendrets.

[7] Van Nay Tablets, Bon Kora, Cole's No. 19, Vegetoids, Eliphat, Retardo, Phytoroides, Dietene.

sold in interstate commerce (R. 274–275, 416–418, 420–423, 488–490).

From the foregoing and other like evidence showing that other preparations and other products were being sold to the public on the basis of the same appeal made by respondent, namely, that they would provide a means or remedy for reducing excess weight, and particularly from the evidence showing that many of these remedies were sold through the same trade channels as respondent's preparation, the Commission found that the producers thereof were in competition with respondent (R. 17–18) and drew the factual inference that respondent's misrepresentations tended to induce members of the public to purchase Marmola in preference to the products of such competitors and to divert trade from them (R. 36).

There was ample evidence to support the Commission's findings that the representations made by respondent in advertising its product were false and misleading.[8] Since respondent in its briefs in the court below failed to raise any question as to

[8] See the testimony of Doctors Soskin (R. 164–229), Miller (R. 229–238), Thompson (R. 292–307), Voegtlin (R. 308–333), Dowling (R. 341–373), and Newburgh (R. 720–754). The advertisements containing the misrepresentations are original exhibits not set forth in the printed record. (See note 11, *infra*, p. 16.) Although the first *Raladam* case in this Court was limited to the question of the jurisdiction of the Commission, the opinion states (283 U. S., at 646): "Findings, supported by evidence, warrant the conclusion that the preparation is one which cannot be used generally with safety to physical health except under medical direction and advice."

the sufficiency of the evidence supporting these findings, it is unnecessary to refer to such evidence here.*

The court below set aside the Commission's order upon the ground that, under the tests laid down in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, there was no substantial evidence to support the Commission's finding that respondent's misrepresentations were injurious to competitors (R. 784–785). What the court apparently regarded as a fatal defect was the absence of any direct testimony that particular products were competitive and the absence of direct proof of actual damage to particular competitors. The court, while purporting to set forth the evidence relevant to the question of competition, ignored most of the evidence to which we have previously referred.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that there was no substantial evidence to support the Commission's finding that respondent's misrepresentations were injurious to competitors.

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* Points not briefed are treated as abandoned. *Twachtman* v. *Connelly*, 106 F. (2d) 501, 509 (C. C. A. 6); *Winterton Gum Co.* v. *Auto Sales, etc., Co.*, 211 Fed. 612, 618 (C. C. A. 6); *Home Benefit Association* v. *Sargent*, 142 U. S. 691, 694–695; *Donnelley* v. *United States*, 276 U. S. 505, 511; *Radius* v. *Travelers Ins. Co.*, 87 F. (2d) 412, 413 (C. C. A. 9); *Andrews* v. *United States*, 108 F. (2d) 511, 515 (C. C. A. 4). Points not presented to the Circuit Court of Appeals are not available to respondent here.

(2) In disregarding the statutor provision that the findings of the Commission, if supported by testimony, shall be conclusive.

(3) In setting aside the order of the Commission.

SUMMARY OF ARGUMENT

I

A. The Commission's findings as to competition and injury to competitors are supported by evidence. There could hardly be more convincing proof of competition than the evidence before the Commission showing that many other products of the same character and catering to the same consumer demand as respondent's preparation, are sold to the general public. Furthermore, the evidence shows that these products are marketed through the same trade channels as respondent's preparation. The evidence likewise fully warrants the inference of fact made by the Commission that the misrepresentations by which respondent promoted the sale of its preparation tended to divert trade from its competitors. Since this Court has, upon like facts, declared that injury to competitors is necessarily to be inferred, the inference of injury made by the Commission in this case must be regarded as at least permissible. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483. Under the statutory provision making the findings of the Commission, if supported by evidence, conclusive, the inferences "reasonably" drawn from the evidence by the Commission are binding.

B. The statute makes unlawful "unfair methods of competition". By its terms, therefore, it requires only a showing that unfair methods have been used and that they have been used in competition with others. To hold that the statute also requires a showing of probable injury to competitors is to read this requirement into the statute by implication. We submit that such an interpretation is not warranted since it tends to defeat rather than to effectuate the purposes of the legislation. The object of the act is to stop unfair methods of competition in their incipiency, even before injury may have occurred. Accordingly, to interpret the statute as authorizing the Commission to proceed only when it can make a showing of injury tends to thwart attainment of the legislative objective.

The decisions of this Court prior to *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, appear to interpret the statute as not requiring a showing of injury to competitors. To the extent that a contrary view is expressed in the *Raladam* case, this view was not necessary to the decision.

II

A. The judgment entered in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, is not an absolute bar to the present proceeding because the proceeding is not upon the same claim as that made in the earlier case and does not present the same questions as were there determined. The respective claims involve conduct in different periods of

time as well as materially different representations. Moreover, the prior case adjudged only the insufficiency of the particular evidence introduced in that proceeding; the present case concerns the sufficiency, not of that evidence, but of the totally different evidence introduced in this proceeding.

B. Inasmuch as this case is an entirely new proceeding, the orders denying leave to adduce additional evidence in the first *Raladam* case have no pertinence.

ARGUMENT

I

THERE IS EVIDENCE TO SUPPORT THE COMMISSION'S FINDINGS AND CONCLUSION THAT THE UNFAIR METHODS USED BY RESPONDENT IN PROMOTING THE SALE OF ITS PRODUCT WERE UNFAIR METHODS OF "COMPETITION"

A. *There is Ample Support in the Evidence for the Findings that Respondent Sells its Product in Competition with Numerous Other Products and that its Misrepresentations Tend to Divert Trade from Competitors*

Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643, held that Section 5 of the Federal Trade Commission Act does not authorize the Commission to prevent unfair trade practices in commerce "apart from their actual or potential effect upon the trade of competitors", and that if, as in that case, the evidence leaves such effect "without proof" and within the realm of mere "conjecture,"

there is a failure of proof as to a fact essential to the Commission's jurisdiction; namely, "the existence of competition." The Court in that case recognized, however, that the statute does not require that the evidence identify particular competitors or establish specific injury—that it is sufficient if the evidence reasonably warrants the inference that there is competition and that the respondent's unfair trade practices are calculated to injure others engaged in like trade. The Court said (p. 649):

> It is obvious that the word "competition" imports the existence of present or *potential* competitors, and the unfair methods must be such as injuriously affect or *tend thus to affect* the business of these competitors—that is to say, the trader whose methods are assailed as unfair must have present or *potential* rivals in trade whose business will be, *or is likely to be,* lessened or otherwise injured. [Italics supplied.]

It also said (p. 651):

> * * * it is not necessary that the facts point to any particular trader or traders. It is enough that there be present or *potential* substantial competition, which is shown by proof, or *appears by necessary inference,* to have been injured, or *to be clearly threatened with injury,* to a substantial extent, by the use of the unfair methods complained of. [Italics supplied.]

We submit that the evidence in the present case fully satisfies the above tests. In support of the Commission's finding of competition there is not only proof that some 19 other packaged preparations were currently sold to the public as remedies for excess weight, but that 18 of these preparations were marketed through the same wholesale or retail outlets, or both, as Marmola (*supra,* pp. 7–8). There could hardly be more convincing proof of competition than evidence showing that other products are sold to the public which are of the same general character—referred to by the Commission (R. 18) as "preparations * * * of the so-called 'patent medicine' type"—and which make the same consumer appeal—that they will effect weight reduction. Obviously those engaged in supplying the same consumer demand, and offering a like product, are in competition. The very number of the antiobesity remedies being marketed and the substantial sales over a period of many years by some of the concerns catering to the consumer demand for remedies for excess weight evidence the competition existing in this field.[10]

[10] At the present hearing respondent's annual sales were between $350,000 and $400,000 (R. 107). At the time of the hearing in the prior proceeding its sales during the two preceding years were about $600,000 a year and before that they had been about $700,000 (Record in first *Raladam* case, p. 34). Respondent and its predecessor have been in business since 1907 (*id.*, pp. 38, 46–47).

Another concern which has been marketing an antiobesity remedy since 1902 or 1903 formerly had sales of over $500 a day (R. 113–115).

There was also evidence that books advertised to the public as setting forth systems for weight reduction by means of diet and exercise were widely sold in interstate commerce (*supra*, pp. 8–9). Respondent itself recognized their competitive character by specifically urging and advising in its advertising the use of Marmola for effecting weight reduction instead of diet, exercise, or other methods (Fg. 3, R. 21).[11] The court below erroneously substituted its judgment upon the facts for that of the Commission (as well as for that of respondent) and concluded that books of instruction on weight reduction were not competitive. It declared that it "cannot say" that those who "read up" on their ailments come within the class of those "deceived by nostrums held out to accomplish miracles of healing" (R. 785).

The evidence likewise fully warrants the Commission's finding that respondent's misrepresentations tend to injure competitors. When a concern is marketing its product in competition with others and promotes its sales by misrepresentation, the inference would seem inescapable that its sales will, or at least tend to, divert trade from its competitors. In fact, this Court has expressly declared that under

[11] See Commission Exhibits 3A, 3H, 3K, 4A, 4C, 4E, 5A, 5C, 5G, 5H, 5–O, 6A, 6B, 6G, 8A, 20, [illegible] (Original). By stipulation of the parties, these exhibits and all others have been omitted from the printed record and treated as physical exhibits (R. 71).

such circumstances injury to competitors is necessarily to be inferred.[12] In *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, the evidence showed that respondent sold its product under deceptive labels and that like products, not thus mislabeled, were sold in interstate commerce, but the Commission made no finding that respondent's unfair practices diverted trade from competitors.[13] This Court, in sustaining the order of the Commission, said (p. 494) that the Commission was justified in concluding that the respondent's mislabeling constituted an unfair method of competition since the business of its trade rivals was "necessarily affected by" that practice.[13]

Since the *Raladam* decision four other circuit courts of appeals in seven cases,[14] and indeed the

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[12] The Commission's findings merely set forth the facts as to competition and as to deception, followed by its conclusion, substantially in the words of the statute, that the mislabeling was an unfair method of competition (Record in the *Winsted* case, pp. 45–51).

[13] In a case decided four months before its decision in the case at bar, the court below itself declared that "when misleading advertisements attract customers by means of deception perpetrated by the advertiser, it is presumed that business is thereby unfairly diverted from a competitor who truthfully advertises his process, method or goods. *Federal Trade Commission* v. *Winsted Hosiery Company*, *supra*." *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. (2d) 175, 182 (C. C. A. 6th), certiorari denied October 20, 1941, No. 580, this Term.

[14] *E. Griffiths Hughes, Inc.*, v. *Federal Trade Commission*, 77 F. (2d) 886, 888 (C. C. A. 2), certiorari denied, 296 U. S. 617; *Federal Trade Commission* v. *Artloom Corp.*, 69 F.

Sixth Circuit itself,[15] have held that evidence showing (1) use of an unfair method in marketing a product and (2) the sale in commerce of other like products satisfies the requirements of the statute without proof of injury to competitors other than that to be inferred from these facts. In the *Electro Thermal* case, cited below, the Circuit Court of Appeals for the Ninth Circuit explained its ruling as follows:

> In this case there are definitely identified parties manufacturing and selling in interstate commerce a device adapted to the same purposes as is the petitioner's. * * *
>
> What the record lacks is any direct evidence to the effect that petitioner's misleading advertising claims diverted any business from its competitors. This, however, is not required by the decision in the Raladam Case, and would in many cases be impossible to prove. It would seem to be sufficient to show actual or potential competition and unfair trade practices which

(2d) 36, 38 (C. C. A. 3); *International Art Co.* v. *Federal Trade Commission*, 109 F. (2d) 393, 397 (C. C. A. 7); *Allen B. Wrisley Co.* v. *Federal Trade Commission*, 113 F. (2d) 437, 442 (C. C. A. 7); *National Candy Co.* v. *Federal Trade Commission*, 104 F. (2d) 999, 1006 (C. C. A. 7), certiorari denied, 308 U. S. 610; *Electro Thermal Co.* v. *Federal Trade Commission*, 91 F. (2d) 477, 480 (C. C. A. 9), certiorari denied, 302 U. S. 748; *Alberty* v. *Federal Trade Commission*, 118 F. (2d) 669, 670-671 (C. C. A. 9), certiorari denied, October 13, 1941, No. 104, this Term.

[15] See *Ford Motor Co.* v. *Federal Trade Commission*, *supra*, note 13.

reasonably tend to give the perpetrator an advantage in such competition.

To the extent that, under the views expressed in the *Raladam* case, there must be a showing of probable injury to competitors,[16] the showing required is merely that there be sufficient evidence to support an inference by the Commission that the unfair practices will probably be harmful to competitors. The statute makes the Commission's findings as to the facts, "if supported by testimony," conclusive, and it is for the Commission, not the reviewing court, to determine the "inferences reasonably to be drawn" from the admitted or established facts (*Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63).[17] This Court has said that the statute therefore forbids a reviewing court "to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences" (*Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73). Such an exercise of power is nonetheless unauthorized because the court in form deter-

[16] We later contend that the statute does not require a showing of injury or probable injury to competitors (*infra*, pp. 24–28).

[17] See to the same effect, under similar statutory provisions, *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 461; *National Labor Relations Board* v. *Link-Belt Company*, 311 U. S. 584, 597.

mines that a finding of the Commission is without support in the evidence (*ibid.*).

In the *Winsted* case this Court treated as obvious the effect of misrepresentations upon the business of competitors, despite the absence of any finding thereon by the Commission. Validity of the inference thus drawn can probably be sustained as a matter of common knowledge. And yet the court below has not merely denied the correctness of this conclusion but has in effect held a Commission inference to that effect to be completely unreasonable.

Although determination of what methods of competition are "unfair" within the meaning of the statute may present a question of law for the courts (*Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 314), whether there is competition and whether competitors are likely to suffer from the unfair practices which have been employed are questions of fact.[18] The Commission's findings on these matters are therefore

[18] They were so treated in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 214–215, 216–217. In that case the Court summarized the Commission's findings, including those as to competition and injury to competitors, and, after noting that these findings were "supported by evidence," adopted them as the basis upon which the validity of the Commission's order was to be determined.

The Commission's findings on analogous questions, such as whether certain practices tend "to lessen competition and to fix uniform prices" and whether certain representations are deceptive, have been likewise viewed as findings of fact

within the statutory provision making its factual findings, if supported by evidence, conclusive.

One other subsidiary question relating to the sufficiency of the evidence may be noted. The court below appears to have been of the opinion that the evidence showing competition with producers of other "patent medicines" was to be ignored (R. 784–785), presumably upon the theory (1) that this was a disreputable type of trade and (2) that the statute does not apply if the only competitors are themselves engaged in disreputable trade.

This view, even if it were correct, would still leave the Commission's findings supported by the evidence showing competition by manufacturers of other products for reducing weight, and the Commission found that there were competitors of respondent who do not misrepresent the products which they sell (R. 36–37).[19] But the reason given for rejecting the evidence respecting the competi-

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which a reviewing court is not at liberty to reject upon the basis of the court's independent appraisal of the weight of the evidence. *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 61–63; *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 116–117.

[19] There was evidence that thyroid preparations, sold through pharmacists on physicians' prescriptions, were not advertised at all to the general public but only to the medical profession (R. 135–137, 414, 452, 458, 467–468, 473).

tion of patented antiobesity remedies rests not only upon an erroneous interpretation of the statute but also upon an unwarranted and erroneous assumption as to the facts.

We submit that it would be improper to adopt a construction of the statute (for which its language and legislative history lend no support) which would make its application depend upon the relative respectability or ethical standards of the trade in which the particular respondent is engaged. If all members of an industry engage in unfair methods of competition, the statute does not immunize the industry but rather permits the Commission to proceed against all the offenders.[20]

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[20] The court below stated that this Court, in the first *Raladam* decision, "tentatively approved our view upon this feature" (R. 785). In its opinion this Court stated (283 U. S., at 652):

> The court below thought that the trade to be protected "was that legitimate trade which was entitled to hold its own in the trade field without embarrassment from unfair competition." There is much force in this conception of the act, and the language just quoted from the *Winsted* case seems inferentially to lend it support. Certainly, it is hard to see why Congress would set itself to the task of devising means and creating administrative machinery for the purpose of preserving the business of one knave from the unfair competition of another. In the present case, however, we do not find it necessary further to consider the merits of this view or to determine whether the facts are such as to bring the case within it.

We think the quoted dictum to be contrary to both the language and the purpose of the statute. The court below

Furthermore, there is no support in the evidence for the apparent assumption made by the court below that the trade in antiobesity remedies is disreputable or that respondent's competitors engaged in comparable misrepresentation of their products. A reviewing court is certainly not warranted in assuming, by way of judicial notice, that during the period covered by this proceeding antiobesity remedies were generally sold by means of misrepresentation. If judicial notice warrants any factual assumption, it is that misrepresentation was not then rife in the trade. As the Government stated (p. 13) in its petition for certiorari in this case, there are now outstanding 29 orders issued by the Commission under the Federal Trade Commission Act, as well as 50 stipulations to which it is a party, prohibiting misrepresentation in the sale of products advertised as remedies, devices, or means for reducing weight. It certainly cannot be assumed that these orders and stipulations were being disregarded or that the entire industry was engaged in making false representations.

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itself seems to have rejected a similar argument in *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. (2d) 175, 181–182, certiorari denied, October 20, 1941, No. 580, this Term.

B. *A Showing of Injury to Competitors Is Not Essential to the Validity of an Order Under Section 5 of the Federal Trade Commission Act*

We have heretofore reviewed the evidence upon the assumption that, under the views expressed in the *Raladam* case, there must be evidence which shows or warrants the inference that the unfair methods which the respondent used in competing with others were injurious to its competitors. We submit, however, that such a showing is not essential to the validity of an order under Section 5 of the Federal Trade Commission Act.

Section declares unlawful "unfair methods of competition in [interstate] commerce". It directs the Commission if it believes that a person is using "an unfair method of competition in commerce", to issue a complaint and, if it concludes, after hearing, that the "method of competition in question" is prohibited by the act, to issue an order to cease and desist from "such method of competition".

By its terms, therefore, the statute requires a showing of only two things, competition in interstate commerce and use of unfair methods in such competition.[21] To hold that a showing of injury or probable injury to competitors is also requisite to the validity of an order of the Commission thereunder is to read an additional requirement into

[21] The statute also provides that the Commission, before issuing a complaint, must conclude that a proceeding by it would be "to the interest of the public," but this requirement is not relevant to the question now under consideration.

the statute by implication. Such an interpretation might be warranted if it could reasonably be said to be necessary to effectuate the purposes of the act. We submit, however, that the interpretation in question tends to defeat rather than to effectuate the purposes of the legislation.

While the statute prohibits unfair methods of "competition" and thus deals with unfair trade practices from the standpoint of their impact upon competitors, it does not follow that its prohibitions apply only in the event of immediate and demonstrable injury to competitors. The object of the statute is to stop unfair methods of competition "in their incipiency" (*Raladam* case, at p. 647; *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 466), but not all types of unfair methods of competition produce or even tend to produce immediate injury to competitors. Accordingly, the objectives of the statute cannot be fully accomplished unless its prohibitions come immediately into play, as the words of the statute indicate, whenever unfair methods are used in competition in commerce, even though injury to competitors may not yet have occurred.

To agree to sell at uniform prices and thus to restrain price competition is an unfair method of competition prohibited by Section 5 (*Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52), but such conduct is not likely to be immediately injurious to competitors since it

gives them the opportunity either to obtain higher prices for their goods, by selling at the prices maintained by the combination, or to increase their share of the total trade, by selling below the prices which the combination maintains. Likewise if a manufacturer, by means of an elaborate policing system, induces distributors of its products to maintain specified resale prices, this is an unfair method of competition prohibited by Section 5 (*Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441), but such conduct is not likely to be immediately injurious to manufacturers of competing products. Distributors of the products of competitors, not being subjected to a restraint on resale prices, should be able to capture a larger share of the market by selling below the resale prices specified by the first manufacturer, and the competitors obviously benefit from any increase in the sales of their distributors.

Thus neither the words of the statute nor the attainment of its purposes require, in addition to a showing of the existence of competition, proof or finding of injury to competitors. The decisions of this Court prior to the *Raladam* case indicate that such was the interpretation which it placed upon the law. In *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483, the Commission found that the respondent had misrepresented the character of its product and that it sold the product in competition with products which were not misrepresented, but there was no finding that competi-

tors were injured by the respondent's practice (*supra*, p. 17). When this Court, in sustaining the Commission's order, said that the respondent's practice was "necessarily" injurious to competitors, it in effect held that upon facts such as were there established, neither proof nor finding of injury to competitors is required. *Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, sustained the validity of the two paragraphs of the Commission's order which were brought before this Court for review although there was neither proof nor finding that the practices prohibited by these paragraphs were injurious to competitors.[22] In *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, there were findings of injury to competitors but they were apparently not regarded as material to the question of the validity of the Commission's order since the opinion of this Court, although stating at length

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[22] The Commission's order was in eight paragraphs, each a separate and independent prohibition. Only paragraphs (b) and (c), prohibiting sales on the basis of agreed price lists and other like price-fixing activity, were brought before this Court for review. The Commission found that certain boycotting combinations prohibited by paragraphs (f)–(h) of the order were injurious to competitors (Fngs. 28, 29), but it made no finding that competitors were injured by the practices prohibited in the other paragraphs of the order. Record in *Pacific States Paper* case, pp. 180–215.)

The evidence before the Commission was no broader than its findings. The facts were stipulated and the Commission's findings substantially followed the stipulated facts, adding certain inferences drawn therefrom (273 U. S. 52, 58, 60).

(pp. 446–451) the facts found by the Commission, does not mention the facts found respecting injury to competitors.

This Court's opinion in the first *Raladam* case in 1931 contains the first indication that probable injury to competitors must be shown. The views expressed in that connection may be regarded as unnecessary, inasmuch as the ruling that the evidence was insufficient to show "the existence of competition" in itself necessitated setting aside the Commission's order.

Section 5 of the Federal Trade Commission Act was amended in 1938 primarily for the purpose of changing the situation caused by the *Raladam* decision.[23] The view was widely entertained in Congress that the amendment, which authorized the Commission to prohibit unfair trade practices without proof of competition or injury to competitors, would restore the meaning of Section 5 intended by Congress when it originally enacted the Federal Trade Commission Act.[24]

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[23] The Wheeler-Lea Act of March 21, 1938, 52 Stat. 111, adding the phrase "unfair or deceptive acts or practices." See S. Rep. 221, pp. 2, 5, 75th Cong., 1st Sess.; H. Rep. 1613, p. 3, 75th Cong., 1st Sess.; S. Rep. 1705, pp. 2, 5, 74th Cong., 2d Sess.

[24] Statements by Senator Wheeler, in charge of the bill in the Senate, on S. 3744, 74th Cong. (80 Cong. Rec. 6436, 6590); statements by two members of the House Committee on Interstate and Foreign Commerce on S. 1077, 75th Cong. (83 Cong. Rec. 395, 397). S. 1077, 75th Cong., which became the Act of March 21, 1938, was identical with S. 3744, 74th

II

THE PROCEEDINGS IN *FEDERAL TRADE COMMISSION* V. *RALADAM CO.*, 283 U. S. 643, ARE NOT A BAR TO THE PRESENT PROCEEDING

Respondent argues (1) that the decision in the first *Raladam* case is *res judicata* in the present proceeding, and (2) that the orders of this Court and the Circuit Court of Appeals in the former case denying the Commission's application for leave to adduce additional evidence precluded the Commission from bringing the present proceeding. The Circuit Court of Appeals rejected the first of these contentions (R. 782) and disregarded the second. Both are plainly unsound.

A. *The Judgment Entered in the First "Raladam" Case is Not Res Judicata of the Issues, or of Any Issue, in the Present Case*

The general rules governing *res judicata* and estoppel by judgment are clearly settled. A judgment upon the merits is an absolute bar to a subsequent proceeding upon the same claim or demand,

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Cong., which passed the Senate but died in the House Committee.

The Committee reports on the original 1914 Act throw no light upon this specific question, and the debates in Congress manifest no definite legislative opinion with respect to it. The summary of the legislative debates in the first *Raladam* opinion (283 U. S., at 648–650) refers only to statements as to the general objectives of the law which, we submit, are entirely consistent with the construction of the statute suggested here.

but in suits upon different claims or demands there is estoppel by judgment only if a question upon which recovery in the second action depends is "the same as" a question litigated and determined in the original proceeding. *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, 623; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 50; *Cromwell* v. *County of Sac*, 94 U. S. 351, 353. And in suits upon different demands, the inquiry is whether a question in issue in the second proceeding has "under identical circumstances and conditions" been previously concluded by a judgment between the parties. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396.

The claim in the instant case is not the same as that made in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, and the judgment entered therein is therefore not an absolute bar here. In the present proceeding the claim is that respondent has, since April 17, 1929, been engaging in unfair methods of competition (R. 34, 38–39, 46). In the earlier case the claim was that, prior to April 13, 1929, the date of the Commission's order, respondent had been engaging in unfair methods of competition.[25] Obviously, a claim of unlawful conduct in one period of time is not the same as the claim of unlawful conduct in another period of time. A prior judgment, although upon the same subject matter, is not conclusive as between the parties of

[25] Record in first *Raladam* case, p. 26.

rights accruing subsequent to rendition of the judgment.[26]

The claims in the two cases are not one and the same for the further reason that they are based upon substantially different misrepresentations. In the prior case the misrepresentations charged and found were that respondent's preparation, Marmola, is based upon "scientific research," is a "scientific" method for treating obesity, and may be used without danger of harmful physical consequences.[27] In the present case, on the other hand, the principal misrepresentations charged and found are that thyroid deficiency is the usual cause of excess weight, that administration of thyroid is the customary and accepted medical treatment for obesity, that Marmola is an efficacious remedy for this condition, and that respondent's advertising discloses all the material facts concerning Marmola's properties and effects (*supra*, pp. 6–7).

Not only is the prior judgment not an absolute bar to the present proceeding but it did not determine any question upon which recovery herein depends. What was determined in the previous case was that the evidence *then before the Commission* was insufficient to support a finding that

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[26] *Auto Acetylene Light Co.* v. *Prest-O-Lite Co.*, 264 Fed. 810, 815 (C. C. A. 6); Freeman, *Judgments* (5th ed., 1925), vol. 2, secs. 605, 606, 619–620, 622; Black, *Judgments* (2d ed., 1902), secs. 741–742, 747–748.

[27] Record in first *Raladam* case, pp. 3–4, 23–24. See 283 U. S. at 645; 42 F. (2d), at 434.

there were competitors of respondent or a finding that competitors were injuriously affected by respondent's false and misleading representations concerning Marmola. The question here in issue is whether the evidence *introduced in the instant case* warrants such findings. Since that evidence is not the same as, or even substantially similar to, the evidence in the earlier case,[28] the questions here in issue are not the same as those previously adjudicated.

Moreover, if it be assumed *arguendo* that the prior judgment conclusively determines as between the parties, not merely the question of the sufficiency of the particular evidence introduced in the prior proceeding, but that prior to April 13, 1929,

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[28] In the prior case the evidence relating to competition consisted of (1) testimony by an officer of the American Medical Association that he had been able to purchase six alleged antiobesity remedies in Chicago drug stores and (2) a list of alleged antiobesity remedies compiled by the same witness from a file of the American Medical Association (Record in first *Raladam* case, pp. 111–112, 130–131). The file was based upon letters or advertisements received by the Association and the witness had no knowledge, except in the case of three concerns, that the companies making the listed remedies were still in business (*ib.*, pp. 131–132, 159–169).

In contrast with this showing, the evidence here shows that numerous products advertised to the general public as antiobesity remedies were marketed through the same wholesale and retail channels as Marmola, that various pharmaceutical products containing thyroid (ordinarily bought on a doctor's prescription) are marketed through the same trade channels as Marmola, and that books of instruction on weight reduction are widely sold in interstate commerce (*supra*, pp. 7–9).

there were, in fact, no competitors of respondent, or none injured by its misrepresentations, such determination is not conclusive upon the question of competition or the question of injury to competitors subsequent to that date. Since determination of the latter questions is governed by the facts existing during the later period and since there was no proof that the facts remained the same during the two periods, the questions which are here in issue are not the same as those previously adjudicated and they certainly are not presented "under identical circumstances and conditions". It follows that the prior judgment does not conclude the parties on either the question of competition or the question of injury to competitors.

Where the question in issue, in suits covering different periods of time, is dependent upon the facts existing in the two respective periods, judgment entered in one suit is not conclusive in a second suit between the parties even though the proof shows that the relevant facts in the two periods are "substantially the same". *Engineer's Club of Phila.* v. *United States,* 42 F. Supp. 182 (Ct. Cls.).[29] As that court observed (pp. 187–

[29] Accord, *Snyder* v. *Commissioner,* 73 F. (2d) 5, 6 (C. C. A. 3), affirmed in an appeal not raising the *res judicata* point, 295 U. S. 134. See also *International Salt Co.* v. *Phillips,* 3 F. (2d) 678, 682 (M. D. Pa.), reversed on other grounds 40 F. (2d) 389, which was in turn reversed 284 U. S. 718; *Duquesne Club* v. *Bell,* 42 F. Supp. 123, 126 (W. D. Pa.).

188), where liability depends upon the whole nexus of pertinent facts during the period of suit and such facts may "easily vary from period to period enough to change the judgment of the same tribunal", determination of the legal effect of one set of facts is not an adjudication as to the legal effect of substantially similar but nevertheless different facts for another period. The doctrine of *res judicata* does not apply under these circumstances.[30]

Tait v. *Western Maryland Ry. Co.*, 289 U. S. 620, upon which respondent relies, has no application to the present case because there the question in issue in the two cases was dependent upon the same historical events, whereas here the questions in issue in the two cases are dependent upon the varying and variable facts currently existing in two separate periods of time. In the *Tait* case there had been a prior adjudication that the railroad, in computing its federal income taxes, was entitled to amortize a proportionate amount of the discount at which

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[30] The doctrine of *res judicata* should not be applied where a question arising in suits on different claims concerns the legal effect of similar but different transactions, because extension of the doctrine to this situation "leads only to continued litigation as to its application" and therefore defeats the very purpose of the doctrine. Griswold, *Res Judicata in Federal Tax Cases* (1937), 46 Yale L. J. 1320, 1335, 1357. Since the doctrine of *res judicata* forecloses inquiry into the truth, it is justified only to the extent that it brings some compensating advantage, that is, when its practical effect is to bring relief from "redundant litigation" and to operate "as a principle of peace" (*id.*, p. 1355).

two predecessor corporations had issued their bonds. When the same question arose in a suit between the parties involving federal income taxes for later years, all of the facts before the court in the second case had been before the court in the first and the applicable law remained the same; accordingly, the matter was held to be *res judicata*. As this Court said (p. 626): "The very right now contested arising out of the same facts appearing in this record, was adjudged in the prior proceeding."

In suits upon different claims a prior judgment is not always conclusive as between the parties even where the question in issue is dependent upon the same historical events. *Blair* v. *Commissioner of Internal Revenue*, 300 U. S. 5. In that case the same question as to the legal effect of certain prior written documents had been earlier adjudicated in a suit between the parties but later a State court had authoritatively determined the question in a suit involving other parties. Because of the "new situation" created by this intervening decision, the question presented in the second suit was said to be not "essentially the same" as that presented in the first and the prior judgment was therefore held to be not *res judicata* of the issue.

B. *Denial of the Applications for Leave to Adduce Additional Evidence in the First Case in No Way Affects the Present Proceeding*

Section 5 of the Federal Trade Commission Act provides that if a person against whom the Commis-

sion has entered an order under that section applies to a Circuit Court of Appeals for review of the order, the court may, upon application of either party, grant leave to adduce "additional evidence".

After this Court held in the first *Raladam* case that the Commission's order must be set aside for lack of evidence on an essential point, the Commission moved in this Court that the judgment be modified so as to include a direction to the Circuit Court of Appeals that the decree of reversal be without prejudice to the taking of additional evidence by the Commission with respect to competitors and injury to competitors. On October 12, 1931, this motion was denied without prejudice to an application to the Circuit Court of Appeals for similar relief. Such a motion was subsequently made in and denied by the Circuit Court of Appeals.[31] Respondent contends that the evidence introduced in this case constitutes "additional evidence" in the proceeding which was before this Court in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, without leave having been obtained from the court to adduce such evidence, as required by Section 5, and that accordingly, the Commission has proceeded in violation of the statute.[32]

The answer to this contention is that it rests upon the mistaken premise that the instant case is a continuation of the proceeding which was ruled

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[31] See Respondent's Exhibits 7 and 9, Origoinal.

[32] The court below made no reference to this contention.

upon in 283 U. S. 643. We have already pointed out that the present case is a wholly independent proceeding, initiated by the filing of a new complaint four years after the close of the prior case, covering a different period of time, and charging materially different misrepresentations (*supra*, pp. 15, 31).

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed, with directions to affirm the order of the Federal Trade Commission.

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